

DECISION



THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D.C. 20548

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FILE: B-218358 **DATE:** July 8, 1985
MATTER OF: Intertractor America Corporation

DIGEST:

1. In the absence of convincing evidence of arbitrary or capricious action, GAO will not question a contracting officer's decision, made in consultation with the small business representative, to withdraw a small business-small purchase set-aside.
2. A contracting officer may properly withdraw a small business-small purchase set-aside after the submission of quotations where no quotes are received from responsible small nonmanufacturers that will, as required by applicable regulations, provide a domestic product.
3. Protester's challenge of the definition of a small nonmanufacturer or the requirement that, under a small business-small purchase set-aside, a domestic product be provided is not a matter for resolution under GAO Bid Protest Regulations.

Intertractor America Corporation protests the decision of the Marine Corps to withdraw the total small business set-aside in request for quotations (RFQ) No. M00681-85-Q-0017, for various quantities of 46 different repair parts for Caterpillar Tractor Crawlers to be delivered to Camp Pendleton, California. The firm also protests the subsequent award to DeNardi Corporation on an unrestricted basis.

We deny the protest.

The RFQ was issued as a small business-small purchase set-aside, in accord with the Small Business Act and applicable procurement regulations. See 15 U.S.C. § 644(j) (1982); Federal Acquisition Regulation (FAR), 48 C.F.R. § 13.105 (1984). The statute and regulation provide that

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contracts with an anticipated dollar value of \$10,000 or less shall be reserved exclusively for small business concerns.

The Marine Corps received six quotes on February 7, 1985, including two from Intertractor and one from DeNardi. During evaluation, the contracting officer noticed that each quotation contained some Caterpillar parts which were known to be manufactured outside the United States. Thus, none of the offerors was able to comply with the requirement in 48 C.F.R. § 19.501(f)(2), that small nonmanufacturers responding to a small business-small purchase set-aside furnish items that have been domestically produced or manufactured.^{1/} The contracting officer therefore withdrew the small-business-small purchase set-aside and completed the procurement on an unrestricted basis. DeNardi, which was awarded the contract on February 13, delivered the required parts on February 28.

Intertractor protests the Marine Corps' decision to proceed with the procurement on an unrestricted basis, arguing that only 5 to 10 percent of Caterpillar's parts are of foreign origin with the remaining parts manufactured in the United States. According to the protester, the labeling of Caterpillar parts as foreign manufactured when such a small percentage is involved is contrary to the policy on which the small business set-aside is based. Under the unrestricted RFQ, the protester further alleges, Denardi has furnished foreign-made parts.

As an exception to the requirement that small business-small purchase set-asides be reserved exclusively for small business, FAR provides that if there is no reasonable expectation of obtaining quotations from two or more responsible small businesses that will be competitive in terms of market price, quality, and delivery, the contracting officer need not proceed with the set-aside and may purchase on an unrestricted basis. 48 C.F.R. § 13.105(d)(2).

Here, the Marine Corps contends that the exception applies, since none of the offerors were able to furnish domestically produced or manufactured items, and since

^{1/} This same requirement appears in the Small Business Administration's regulations. See 13 C.F.R. § 121.5(b)(2)(iii) (1985).

our Office has held that this is a matter of responsibility (citing Easco Tools, Inc., et al., B-212783, et al., Jan. 19, 1984, 84-1 CPD ¶ 83). The Marine Corps concludes that the contracting officer correctly withdrew the small business-small purchase set-aside because it would not be possible to make an award under it to a responsible small business, i.e., one that met the domestic manufacture requirement.

The Marine Corps also informs us that the contracting officer consulted with Camp Pendleton's small business representative, whose decisions are audited by the Small Business Administration (SBA), concerning the withdrawal. We will not question a determination by a contracting officer to withdraw a small business set-aside where the SBA representative has concurred in the withdrawal and in the absence of convincing evidence of arbitrary or capricious action. Automated Datatron, Inc., B-218284, May 9, 1985, 85-1 CPD ¶ 516; Tufco Industries, Inc., B-189323, July 13, 1977, 77-2 CPD ¶ 21. The protester here has not presented any arguments contending that the withdrawal was arbitrary or capricious. Since the record suggests that the withdrawal was in accord with applicable regulations, and since the small business representative was consulted, we believe the action was proper.

Intertractor, the third-low bidder, unlike the first and second-low bidders, offered to supply a substantial number of non-Caterpillar parts that are manufactured domestically. Intertractor appears to believe that it should be awarded the contract because it proposed to supply the highest amount of domestic parts at the lowest price. In this regard, the protester questions whether the requirement that a nonmanufacturer supply a product that is entirely manufactured in the United States is achievable since, according to the protester, it is virtually impossible today to find a domestic company that does not directly or indirectly utilize some foreign product content.

To the extent that Intertractor wishes to challenge the definition of a small nonmanufacturer or the requirement that such a firm provide a domestic product, this is not a matter for resolution under our Bid Protest Regulations, 4 C.F.R. part 21. These are reserved only for considering whether the award or proposed award of a contract by a federal agency complies with the procurement statutes

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or Regulations. 31 U.S.C.A. § 3552 (West Supp. 1985) as added by the Competition in Contracting Act of 1984; 4 C.F.R. § 21.1(a) (1985). Here, as discussed, there is no evidence that the procurement was conducted contrary to statute or regulation.

The protest is denied.

for *Signature* *Ejras*
Harry R. Van Cleve
General Counsel